

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



July-September 2007

OPINIONS

COURTS AND JUDGES – DISTRICT COURT – CRIMINAL PROCEDURE – DISTRICT COURT JUDGE HAS DISCRETION WHETHER OR NOT TO GRANT STAY OF SENTENCE OF IMPRISONMENT PENDING APPEAL

Question: Does a District Court judge have the authority to refuse to stay a sentence of imprisonment for a criminal conviction pending the defendant's appeal to the circuit court?

Answer: A District Court judge may grant a stay of a sentence of imprisonment and release the defendant pending appeal, but is not required to do so. A defendant who is denied a stay by the District Court may also seek release pending appeal and request a stay from the circuit court. However, the circuit court also has discretion to deny that request.

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September 25, 2007

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EDUCATION – PUBLIC SCHOOLS – GENERAL ASSEMBLY MAY RAISE THE AGE FOR COMPULSORY SCHOOL ATTENDANCE IN PRINCE GEORGE'S COUNTY FROM 16 TO 18

Question: May the General Assembly raise the age for compulsory school attendance from age 16 to age 18 in Prince George's County.

Answer: Yes.

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September 4, 2007

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ELECTIONS – BALLOTS – VOTING – ABSENTEE BALLOT OATH SHOULD BE MODIFIED TO INCORPORATE CONDITIONS FOR USE OF ABSENTEE BALLOT BY TRACKING CONSTITUTIONAL LANGUAGE

In *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006), the Court of Appeals held that a statute authorizing voting in advance of election day violated the Maryland Constitution. In the course of that decision, the Court construed Article I, §3, the constitutional provision authorizing absentee ballots, to pertain only to absent voters, not those who find the voting day to be merely inconvenient.

Question: What language should be used for an absentee ballot oath?

Answer: The absentee ballot oath should track the language of Article I, §3 – that is, the voter should be required to swear or affirm that he or she will be absent or will be unable to vote in person on election day. If an amendment of Article I, §3 passed by the General Assembly at its 2007 session is ratified by the voters, the absentee ballot forms should be amended to track the amended provision or any legislation governing absentee ballots consistent with that provision.

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July 18, 2007

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ELECTIONS – CAMPAIGN FINANCE – WHETHER CAMPAIGN FINANCE ENTITY MAY MAKE UNLIMITED CONTRIBUTION TO A POLITICAL PARTY BY DESIGNATING IT FOR ONGOING ADMINISTRATIVE EXPENSES

Question: May a campaign finance entity registered with the State Board of Elections expend funds in the form of a contribution to a

political party designated exclusively for its ongoing administrative expenses?

Answer: No. The Campaign Finance Law explicitly permits a campaign finance entity to transfer up to \$6,000 to a political party during a four-year election cycle. Under the longstanding interpretation of that law, if an individual or entity contributes funds to a political party and specifies that they be used only for the party's ongoing administrative expenses – as opposed to expenses associated with a particular election cycle – the contribution is not subject to the limits set by the Campaign Finance Law. However, unlike other potential contributors to a political party, a campaign finance entity may expend funds only to “promote or assist in the promotion of the success or defeat of a candidate, political party, or question at an election.” If a campaign finance entity were to make a contribution (*i.e.*, transfer) to a political party with the proviso that it could *only* be devoted to the party's ongoing administrative expenses unrelated to any particular election, that expenditure would be for a nonelectoral purpose and would not be a permissible expenditure by the campaign finance entity under the Campaign Finance Law.

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August 6, 2007

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**HEALTH – MEDICAL RECORDS – APPLICATION
OF MARYLAND MEDICAL RECORDS
CONFIDENTIALITY ACT TO A POSSIBLE
STATEWIDE “HEALTH INFORMATION
EXCHANGE” MECHANISM**

The following questions relate to the impact of the Maryland Medical Records Confidentiality Act, Title 4, Subtitle 3 of the Health-General Article (“HG”), Annotated Code of Maryland, on the design and operation of a statewide health information exchange (“HIE”) mechanism. An HIE, in brief, enables the electronic transmission of clinical and payment information about a patient among participating health care providers and payers.

Question 1: Does the Medical Records Confidentiality Act (“Act”) prohibit creation of an HIE?

Answer: No. The Act does not prohibit creation of an HIE.

Question 2: Assuming that the Act does not prohibit creation of an HIE, does it mandate or prohibit particular aspects of an HIE's design or operation?

Answer: The Act mandates that collaborators in the HIE assume contractual obligations regarding the security and redisclosure of medical records, so that all access to the records within the HIE is for legally recognized purposes and redisclosure outside the HIE is prohibited.

Question 3: Does the Act require explicit patient consent for his or her medical records to become part of the HIE, or may these records be included without consent?

Answer: If a patient's medical records are to become part of an HIE as a consequence of the provider's participation in the HIE, this fact should be disclosed to the patient preceding the rendering of services, so that the patient may weigh this factor in deciding whether to receive services from the provider. However, the “authorization” specified in the Act, which goes beyond common law consent, is not required for a patient's medical records to become part of the HIE, so long as the transmission of medical records is solely for the purposes of health care for the patient, payment for that care, or the other objectives specified in HG §4-305; and suitable administrative and technical safeguards are in place to prevent improper access to or use of the records.

Question 4: If routine exchanges of medical records may occur among HIE collaborators without patient consent, does a patient nevertheless have a right under the Act to “opt out” of the HIE – that is, insist that all or part of his or her medical records be excluded from the HIE?

Answer: No. A patient does not have a right under the Act to “opt out” of an HIE.

Question 5: In what respects does the Act require information about mental health services to be handled differently from other medical records?

Answer: To the extent that medical records pertaining to mental health services are included in the HIE, the Act requires special procedures to ensure limited access.

Most participants in an HIE would be subject to federal law on the confidentiality of medical records, particularly the Privacy Rule issued by the Department of Health and Human Services to implement the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). Your request, however, did not ask about HIPAA issues. In addition, to the extent that the HIE includes the medical records of patients in alcohol abuse and drug abuse treatment programs, disclosure and use of these records would be governed by the federal regulations on confidentiality of alcohol and drug abuse patient records. *See* 42 CFR Part 2. These federal regulations are incorporated by reference into Maryland law. *See* HG §8-601(c).

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August 6, 1007

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**MUNICIPALITIES – FEES – WHETHER
CONNECTION FEES MAY BE USED FOR
OPERATING COSTS OF MUNICIPAL WATER AND
SEWERAGE TREATMENT FACILITIES**

Question: This opinion concerned the permissible uses by the City of Brunswick (“City”), of revenues from fees charged for connection to the municipal water and sewerage systems – specifically, whether these revenues may be devoted only to capital infrastructure costs or whether they may also be used for operating costs of the City’s water and sewerage treatment facilities.

Answer: The City Charter authorizes the City to collect charges in accordance with State law and that neither the City Charter nor the City ordinances themselves limit the City’s use of connection fees. The Sewerage Facilities Bond Act, EN §9-801 *et seq.*, might be interpreted to allow

use of connection fee revenues to cover “expenses of repair and maintenance of sewerage (not water) systems if such fees fall within the definition of ‘revenue from the sewerage facility’,” had the City issued bonds under this statute. Under the City’s current financing agreements, revenues from sewer connection fees are dedicated to debt service. Revenues from any connection charges that might be imposed under EN §9-722(a) would be dedicated to debt service. Even if connection fees were to be imposed under other statutory authority, it is unlikely that the resulting revenues could be used for routine operating costs of the City’s water and sewerage treatment facilities.

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September 25, 2007

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**PROCUREMENT – WHETHER STATE AGENCIES
MAY USE THE “CONSTRUCTION MANAGER AT
RISK” PROJECT DELIVERY METHOD UNDER
THE STATE PROCUREMENT LAW**

The “construction manager at risk” (“CMR”) method is described as commencing with a State agency’s procurement of a construction manager by a competitive process. The construction manager is then responsible for working in conjunction with the architect on the design, providing a “guaranteed maximum price” for construction of the project – accepting the risk that the cost of the project may exceed that price – and procuring the actual construction of the project.

Question: Does the CMR method, which generally involves a competitive procurement process for the construction manager only at the initial phase, improperly avoid requirements of the State Procurement Law intended to foster competition?

Answer: State law does not prohibit the use of CMR as a project delivery method, provided (a) the construction manager is selected by one of the means authorized by the Procurement Law, such as competitive sealed bidding or competitive sealed proposals, or by the approved policies and procedures of agencies not subject to the Procurement Law, and (b) the agency complies

with any applicable regulations and directives of the Board of Public Works. The merits of CMR with respect to a particular construction project will depend on how well the procurement is structured to provide the winning construction manager with incentives to limit the cost of the project while delivering it in a timely manner. The General Assembly has delegated to the Board of Public Works the authority to set policy under the Procurement Law. It is the role of the Board to decide whether the use of CMR as a project delivery method in a particular case is structured to be advantageous to the State and in accordance with the general purposes of the Procurement Law. The Board may wish to consider adopting regulations or policies to guide agencies in structuring CMR contracts to meet these goals.

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July 13, 2007

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ADVICE LETTERS

ADMINISTRATIVE LAW – AELR – EMERGENCY REGULATIONS

Question: The State Board of Elections has proposed emergency regulations to alter certain deadlines concerning absentee ballots in connection with the 2007 Baltimore City mayoral primary elections. Does the Administrative, Executive and Legislative Review (AELR) Committee have the authority to take partial action on these proposed emergency regulations?

Answer: Yes. Under §10-118 of the State Government Article, the AELR Committee may exercise its powers over an emergency or proposed regulation or “a specific, distinct, and severable” provision of an emergency or proposed regulation. In that the portion of the proposed regulation requiring a voter to mail his or her absentee ballots on or before election day is severable from the

portions of the regulations relating to absentee ballots, the Committee may take split action on the proposed regulations.

Letter to
Anne Healey
Chair, AELR Committee
July 18, 2007

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FIREARMS PERMITS – MENTAL HEALTH INFORMATION

Question: A recent change was made to the application for purchase of a regulated firearm by requiring the applicant to complete a form, which requires that a person seeking to purchase a regulated firearm authorize the release of information by the Department of Health and Mental Hygiene, or similar agency concerning whether the applicant suffers from a mental disorder. Does the Maryland State Police have authority to impose this requirement?

Answer: Yes. The Secretary of State Police has the authority to adopt application forms and regulations to carry out the Regulated Firearms Subtitle, and to regulate the possession of a firearm by a person who suffers from or has been treated for a certain amount of time for a mental disorder. Maryland State Police’s regulatory authority is also sufficient to allow it to impose such an requirement authorizing it to investigate the truth or falsity of the applicant’s signed statements.

Letter to
Senator John Astle
July 12, 2007

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FIRST AMENDMENT - LOBBYIST REGISTRATION FEES

Question: Would legislation that would raise the lobbyist registration fee from \$50 to \$250 and dedicate those funds to a public campaign finance fund be constitutional?

Answer: A registration fee in and of itself is not unconstitutional; however, such legislation would be a restriction on free speech in violation of the First Amendment, because the fee is not tied to the costs of lobbyist regulation and the revenues to be raised from the fees are to be used for an unrelated purpose.

*Letter to
Senator James Brochin
September 17, 2007*

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IMPERVIOUS SURFACE FEES - RETROACTIVE APPLICATION

Question: HB 1220 proposed in the 2007 legislative session to, among other things, establish an impervious surface fee beginning July 2008 payable to local government upon the issuance of a grading or building permit. The bill failed. Could a future bill impose the impervious surface fee originally proposed in HB 1220 (2007) on a retroactive basis?

Answer: No. As a general rule, a tax or fee is not unconstitutional simply because it has some retroactive effect. In some cases, retroactive application in the ratification of taxes and fees has been found to interfere with vested rights, and thus to violate due process. In other cases, however, retroactive legislative ratification has been upheld if the tax or fee is imposed to correct an error in administration, or when applied to certain “recent transactions.” Retroactivity of the impervious surface fee in HB 1220, however, would not fit within any of these permissible categories. Moreover, since retroactivity of the fee would likely lead a court to find substantial injustice and would impair vested rights, retroactivity would be invalid. However, an impervious surface fee could be imposed on current owners of a property.

*Letter to
Delegate Robert A. McKee
August 6, 2007*

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MEDICAL TREATMENT - WOMEN’S RIGHTS

Question: Can a woman be forced to have a cesarian section?

Answer: Maryland law has long recognized a person’s right to exercise control over his or her own body. While it is clear that a woman has the right to choose her medical treatment and medical procedures, it is possible that a doctor could seek to perform the procedure against the woman’s wishes in an emergency situation where the doctor believes that the procedure is necessary to preserve the life of a viable fetus. Generally, interference with a woman’s informed decision about her medical treatment, including whether to have a cesarian section, should not be allowed except in the most compelling circumstances. Moreover, as the Attorney General has previously opined in 75 *Opinions of the Attorney General* 253 (1990), “the physician’s role is to identify the treatment alternatives that are medically reasonable..., explain the consequences ... and offer a medically appropriate recommendation.... The final decision, however, is to be made by the patient or the patient’s surrogate, not by the physician.”

*Letter to
Delegate Cheryl D. Glenn
July 23, 2007*

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PUBLIC SERVICE COMMISSION – BUDGETARY ADMINISTRATION

The Public Utility Companies law contemplates that the cost of the Public Service Commission (“Commission”) and the Office of People’s Counsel (“OPC”) are to be financed through a special fund. Although an annual assessment of public service companies is the primary source of revenue for that fund, certain filing and other service fees are also designated for that fund. The statute also provides for the outcome that the Commission’s actual expenses will not exactly match its estimate of expenses and the amount of revenue collected to defray those expenses. In particular, the statute provides for supplemental assessments if expenses exceed revenues and for a deduction in the

computation of future assessments, if revenues exceed expenses.

Question: Are funds generated from other revenue sources, such as document filing fees, to be considered in computing the assessments of public service companies, made to cover the costs of the Commission and the OPC?

Answer: If the aggregate annual assessment does not cover actual expenses, fee revenue must be taken into account before the Commission imposes a supplemental assessment on public service companies. In the converse situation where actual revenues exceed actual expenses, the fee revenue must be taken into account in computing the assessment for a future fiscal year. The fee revenue, from whatever source, should be used as an offset in the computation of other assessments.

Letter to
Donald Eveleth
Deputy Executive Secretary
Public Service Commission
July 9, 2007

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RECORDATION TAX – COUNTY RATES/ EXEMPTIONS

Under Tax-Property Article §12-103, Baltimore City and the counties may set, by law, the recordation tax rate in the county. These jurisdictions are further authorized to provide for two types of exemptions.

Question 1: Does State law allow the recordation tax rate to vary with the size or location, or amount of consideration paid for, an individual residential property or class of properties?

Answer: A variable rate based on consideration is within the statutory authorization and would not violate the Uniformity Clause of the

Maryland Declaration of Rights. However, absent express authorization, a rate schedule based on size or location seems to be inconsistent with current law.

Question 2: Does State law allow a county, by law, to exempt any other class of residential properties from payment of all or a portion of the tax?

Answer: No. The Tax-Property Article does not give the County plenary power to enact tax exemptions.

Question 3: Does State law allow the amount of consideration paid for an owner-occupied residential property that may be exempted from the tax to vary with the total consideration paid for the property?

Answer: No.

Letter to
Delegate Sheila Ellis Hixson
August 7, 2007

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TERMINATION OF PARENTAL RIGHTS – PRISONERS

Question: Under what circumstances would a parent's rights be terminated upon conviction or incarceration of the parent?

Answer: Under Maryland law, there is no statute that would automatically terminate a parent's rights upon conviction or incarceration. Under Family Law Article §5-323(d), however, a court is to weigh several factors in determining whether parental rights should be terminated, including whether the parent has been convicted of a crime of violence against a minor offspring, the child in question, or another parent of the child; and whether the parent, because of incarceration or

otherwise, fails to take advantage of the services offered the parent by the State before the child's placement to facilitate reunion.

Letter to
Delegate Donald B. Elliott
September 24, 2007

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